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IN THE

Supreme Court of the United States

October Term, 1960

No. 584

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,

Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

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Appellants,

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Intervenor-Appellants,

AGAINST

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Appellees,

UNITED PARCEL SERVICE, INC.,

Intervenor-Appellee.

JURISDICTIONAL STATEMENT

On Appeal From the United States District Court For the Southern District of New York

Appellants appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 10, 1960, dismissing their amended complaint which sought to set aside a final order of the Interstate Commerce Commission (hereinafter called the "Commission"), and respectfully submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the District Court for the Southern District of New York is reported in 185 F. Supp. 96 (1960) and is annexed hereto as Appendix "A". The Report of the Commission (Division 1) which was adopted by the entire Commission by order dated February 4, 1960, after petitions for reconsideration were denied, is published in 79 M. C. C. 629 (1959).

Jurisdiction

The suit was instituted under Title 28 U. S. C. Sections 1336, 2321-2325 and Title 5 U. S. C. Section 1009, to set aside an order of the Commission. The judgment of the District Court was entered on June 10, 1960, and notice of appeal was filed in the District Court on August 8, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C. Sections 1253 and 2101(b). The following decisions sustain

the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 97 L. ed. 54, (1952); *United States* v. *Capital Transit Company*, 325 U. S. 357, 89 L. ed. 1663 (1945); *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236, 90 L. ed. 38 (1945); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 90 L. ed. 82 (1946).

Questions Presented

There are two principal questions presented by this appeal which involve the construction and administration of the Interstate Commerce Act, Part II (herein called the "Act"), (49 U. S. C. Section 301 et seq.):

1. May a Certificate of Public Convenience and Necessity be issued to an applicant motor carrier, under Section 207 of the Act, (49 U. S. C. Section 307) where the applicant is party to a control relationship which concededly requires, but has never received, the approval of the Commission under Section 5 of the Act (49 U. S. C. Section 5)?

2. May a motor contract carrier, which is a wholly owned subsidiary of a non-carrier parent which controls other regulated motor carriers, secure authority as a motor common carrier if the parent and other regulated subsidiaries do not join in an application for approval of the new control relationship under Section 5 of the Act (49 U. S. C. Section 5)?

There are three related questions which involve the application of principles of commerce and administrative law:

3. Where the record, as a whole, shows that shippers supported a motor carrier application for a Certificate of Public Convenience and Necessity because of a promise of rates lower than those of competing motor carriers and where the evidence of the applicant's ability to maintain the proposed lower rates is "meagre" and there was no evidence of inadequacy of existing service and no evidence that existing motor carriers would not be adversely affected, does the grant of a Certificate violate the provisions of Section 207 of the Act (49 U. S. C. Section 307) and was the challenged order in this case bottomed upon adequate findings of fact and were these findings supported by substantial evidence?

4. May the Commission, contrary to the provisions of Section 221(b) of the Act (49 U. S. C. Section 321(b)), issue a Certificate of Public Convenience and Necessity before the expiration of thirty days from the date of service of an order of the entire Commission denying petitions for reconsideration of an order of Division 1 of the Commission which granted a Certificate?

5. Did the restrictions imposed upon Applicant, in this case, meet the requirements of Section 210 of the Act (49 U. S. C. Section 310)?

Statutes Involved

Sections 5(2)(b), 5(4), 5(9), 17(8), 207, 210 and 221(b) of the Interstate Commerce Act [49 U. S. C. Sections 5(4), 5(9), 17(8), 307, 310 and 321(b)] and Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U. S. C. Sections 1007(b) and 1009(e)]. These are set forth in Appendix "B" hereto.

Statement

1. The Application Matter:

On or about September 12, 1956, Intervenor-Appellee, United Parcel Service, Inc., formerly known as United Parcel Service of New York, Inc. (herein called "United"), a wholly owned subsidiary of United Parcel Service of America, Inc., a Delaware corporation (herein called the "Parent"), applied for a Certificate of Public Convenience and Necessity as a motor common carrier pursuant to Section 207 of the Act (49 U. S. C. Section 307) seeking authority to transport general commodities in packages of certain limited weights and dimensions between points within the metropolitan area of New York, New York and adjoining portions of New York, New Jersey and Connecticut (herein called the "New York Origin Territory"), and from points and places in the New York Origin Territory to certain points in New Jersey, Connecticut, Rhode Island, Massachusetts and eastern New York, and from points within and adjoining the metropolitan area of Boston, Massachusetts to points and places in Connecticut, Rhode Island, Massachusetts, New Jersey, New York, Vermont, New Hampshire and Maine (herein called the "Boston Origin Territory").

At the time that United filed its application, it held a Permit as a contract carrier which authorized the transportation of various commodities, between retail specialty shops and department stores, on the one hand, and their warehouses and retail customers, on the other, between New York City and adjacent areas in New York, Connecticut and New Jersey and between West Hartford, Connecticut and limited points in New York and New Jersey.

Railway Express Agency, Incorporated (REA), the other appellants and numerous other motor common carriers who also transport packages in the territory which United sought to serve, opposed United's application.

After the hearing, the Hearing Examiner recommended that United be granted authority only from the Boston Origin Territory. As for the New York Origin Territory, the Examiner found, in effect, that there was no need for the additional service proposed by United. However, he specifically recommended that the application be denied because United was not prepared to surrender its contract carrier authority, thereby giving rise to dual operations in violation of Section 210 of the Act.

Exceptions were filed by protestants and United, and Division 1 of the Commission, with Chairman Murphy dissenting, granted all of the authority sought by United. Thereupon, appellants and other protestants filed petitions for reconsideration with the entire Commission, and while these petitions were pending, the appellants (except REA) filed a motion with the Commission requesting that the issuance of a Certificate to United be stayed pending an application which appellants claimed was required to be filed by United, its Parent and various subsidiary motor carriers of the Parent for approval, under Section 5 of the Act, of certain illegal control relationships between and among United, the Parent and its subsidiary motor carriers.

2. The Control Issue:

The basis for appellants' motion was this: prior to 1935, the Parent controlled various subsidiary motor carriers engaged in contract carrier operations. Concededly, continuance of these relationships did not require approval under the doctrine enunciated in *Greyhound*

Mergers, 1 M. C. C. 342 (1935). However, subsequent to 1935, certain of the subsidiary motor carriers which had no authority of any kind, acquired new operating authority and although approval under Section 5 authorizing the control between and among the Parent, the existing subsidiary regulated motor carriers and the new motor carriers was required, it was neither sought nor granted by the Commission.

In 1938, United Parcel Service of Pennsylvania, Inc. (herein called "United of Pennsylvania"), a newly created company, applied for and acquired contract carrier authority under Section 209 of the Act. United of Pennsylvania did not qualify as a "grandfather" carrier. *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938).

In 1941, United Parcel Service of Portland (herein called "Portland"), a regulated carrier, applied for and was granted authority to acquire the contract carrier authority of one A. J. Wiese in *United Parcel Service of Portland—Purchase—A. J. Wiese*, 37 M. C. C. 474 (1941). At the date of the application and approval, Portland was a wholly owned subsidiary of United Parcel Service of America, Inc., a Nevada corporation (herein called "Nevada"), a non-carrier, and Nevada was a wholly owned subsidiary of the Parent. Neither the Parent nor the other subsidiary carriers were parties to the application and this control relationship was never approved.

In 1957, United Parcel Service of Cincinnati, Inc. (now known as United Parcel Service, Inc. and herein called "Cincinnati"), while holding a Permit as a contract carrier, acquired a Certificate of Public Convenience and Necessity under Section 207 of the Act. See *Railway Express Agency* v. *United States*, 153 F. Supp. 738, aff'd per

curiam, 355 U. S. 270, 2 L. ed. 257 (1957). Here, too, there was no application by the Parent and the subsidiaries under Section 5 of the Act, although such an application was required there as it was in the case at bar.

At no time, therefore, when new authority was acquired by motor carriers who were and are members of the United family, by acquisition or application, was an application filed under Section 5 of the Act for approval of the common control and management between and among the Parent and its various subsidiary regulated motor carriers.

3. The Commission's Order:

The Commission (with four Commissioners dissenting) denied the various petitions for reconsideration of the report and order of Division 1, and denied appellants' motion to stay the proceedings pending a Section 5 proceeding.[1]

Although the Commission's order denying the petitions for reconsideration and appellants' motion, was dated February 4, 1960, it was not received by appellants until February 26, 1960. On March 9, 1960, a Certificate was issued to United which granted the authority sought. Purportedly to meet the inhibition of Section 210 of the Act, United was prohibited from serving, under its new common carrier authority, those persons which it serves as a contract carrier and the Commission reserved jurisdiction to impose further conditions and limitations to as-

1. A complaint filed by appellants (other than REA) alleging a violation of Section 5 by United, the Parent and the various subsidiary motor carriers was dismissed. The Commission's order of dismissal is reprinted in Appendix "C" for the convenience of this Honorable Court. However, it is not part of the record on this appeal.

sure that United's operations would comply with Section 210 of the Act.

4. The Proceedings In the District Court:

Appellants brought this action in the United States District Court for the Southern District of New York to set aside and enjoin the enforcement of the order of the Commission dated February 4, 1960 and to nullify the Certificate issued thereunder, pursuant to Title 28, U. S. C. Sections 1336 and 2321-2325 and Title 5 U. S. C. Section 1009. As set forth in Appendix "A", the Court below denied appellants' request for relief and dismissed the amended complaint.

The Questions Are Substantial

This appeal presents substantial and important questions concerning the construction and administration of the Interstate Commerce Act, Part II, which have never been passed upon by this Honorable Court. The issues posed by the first two questions also involve matters of profound economic significance in the field of transportation. Since 1935, there has been a secular trend towards concentration of motor carrier facilities, a steady decline in the economic status of the small independent motor carrier (*Interstate Commerce Commission Sixty-Eighth Annual Report*, 1954) and a progressive deterioration in his ability to compete (*Trucking Mergers, Concentration, and Small Business: An Analysis of Interstate Commerce Commission Policy*, 1950-1956, Report Prepared For The Select Committee on Small Business, United States Senate, June 1957, 85th Cong. 1st Sess.). If a vast network of commonly controlled corporations can escape the searchlight of a Section 5 proceeding by acquiring operating authority through newly created subsidiaries or by the so-called addition to

one type of operating authority of an entirely different type of authority, the perimeter of power of large motor carriers is extended without regard for the Congressional principles embodied in Section 5 and in violation of the National Transportation Policy.

Further, the decision by the Court below places a gloss on *Alleghany Corp.* v. *Brewick & Co.*, 353 U. S. 151, 1 L. ed. 2d 726 (1957) which renders that case and *United States* v. *Marshall Transport*, 322 U. S. 31, 88 L. ed. 1110 (1944) irreconcilable. It is urgent, therefore, that this Court announce whether or not Section 5 is jurisdictional (Appendix "A", p. 40).

The Court below held that the patent violation of Section 5 by United and its Parent "did not forbid the issuance of a Certificate" to United (Appendix "A", p. 40). For this, the Court below relies upon its exiguous assumption that the Commission can, in a case such as the one at bar, forgive a violation of Section 5(4) and, simultaneously, reward a violator (Appendix "A", p. 40). It is plain that the District Court misreads the statute and the decisional precedents.

The Court below has also vitiated the statutory provisions relating to public convenience and necessity and the relevant decisional precedents. In essence, the District Court has held that a Certificate of Public Convenience and Necessity may be issued if there is a promise of low rates to the shipping public, despite the absence of any proof that the proposed service can be profitably conducted and notwithstanding a failure by the applicant to prove, first, that adequate service cannot be obtained from existing motor carriers and, second, that existing motor carriers will not be adversely affected. The insupportable action of the Commission is sustained by the Court by re-

sorting to the wellworn caveat that courts ought not to interfere with the judgment of an administrative agency. Although the Court below properly found that the decision in *Railway Express Agency* v. *United States*, 153 F. Supp. 738, aff'd per curiam, 355 U. S. 280, 2 L. ed. 2d 257 (1957) is not controlling here, (Appendix "A", p. 30) it proceeded to rubber stamp the Commission's order, contrary to the principles enunciated in *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 2 L. ed. 2d 117, (1957) and *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 95 L. ed. 456 (1951).

Additionally, the Court below misconstrued and rewrote Section 221(b) of the Act by converting the mandatory language into a permissive text which allows the Commission to determine whether it will be bound by the provisions of the Act.

Finally, United was permitted to engage in dual operations contrary to the National Transportation Policy and Section 210 of the Act and without any probative findings that the dual operations are consistent with the public interest. The conditions imposed by the Commission in United's Certificate do not foreclose the possibility of discriminatory practices against which the Act was designed.

1. Although the Court below acknowledged that there were and are unapproved control relationships between and among United, the Parent and the various subsidiary motor carriers contrary to the provisions of Section 5 of the Act, (Appendix "A", p. 40), it was held that this did not preclude the issuance of a Certificate to United. To reach this result, the District Court relied upon the decision in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (CA 2, 1941), in which the Court of Appeals for the Second Circuit decided that the "control"

provisions of the Civil Aeronautics Act (49 U. S. C. Section 488) did not preclude the issuance of new authority despite the existence of an unlawful control relationship.

The District Court in this case erroneously assumed that the identical result must follow under Section 5 of the Act and that the Commission had accepted the *Pan American* doctrine (Appendix "A", pp. 38-39). The fact is that the Commission rejected the *Pan American* principle *in M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944) where the Commission held:

> "It is apparent that without approval under Section 5(2) to control the two motor carriers, Hannon would immediately be in violation of the specific prohibition of section 5(4) upon his exercise of the authority granted under Section 209. The words 'or otherwise' appearing in Section 5(2) are broad enough to encompass what Hannon proposes as a permissively lawful transaction thereunder, and which we are empowered to approve if we find it to be consistent with the public interest. Compare Pan American Airways Co. v. Civil Aeronautics Board, 121 Fed. (2d) 810, (p. 622)."

In *Hannon* the Commission refused to issue a Certificate where a control relationship had not been first approved under Section 5 of the Act. Simply stated, the facts in *Hannon* were on all fours with the facts in *Pan American*. Both the Commission in *Hannon* and the Court of Appeals in *Pan American* held that a control relationship was created immediately as authority was granted to an unregulated subsidiary. But while the Court in *Pan American* held that authority could be granted despite the unapproved control relationship, the Commission held directly to the contrary.

The phrase "Compare Pan American" which appears in the *Hannon* report shows that the Commission did not accept the *Pan American* principle as applicable to the Act. This was made evident, once again, in *Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959) where the Commission refused to issue a Certificate until there was prior approval, by the Commission, of the control relationship under Section 5.

This result is consistent with the teaching of *United States* v. *Marshall Transport Co., supra,* where this Court held (pp. 40-42) that the Commission has no authority to proceed with an application which involves an unapproved control relationship in the absence of an application, under Section 5 of the Act, for approval of that relationship.

Contrary to the conclusion of the District Court, the decision in *Alleghany Corporation* v. *Breswick & Co., supra,* does not attenuate the Marshall doctrine. This Court did not say that Section 5 is not jurisdictional so that the Commission may approve applications where a controlling carrier or non-carrier is not party to a control application, but rather that it is "not strictly jurisdictional in the sense that if the Commission wrongly decides" that A does not control B which seeks to control C that "the Commission loses jurisdiction over B, the power to regulate B" (p. 171). In short, a wrong decision exculpating a person or corporation from regulation under Section 5 does not foreclose the later assertion of jurisdiction by the Commission. The illustration given by this Court in the *Alleghany* case, *supra,* demonstrates the egregious error of interpretation committed by the District Court.

Clearly, then, the fact that the Parent and the other motor carrier subsidiaries did not join in a Section 5 pro-

ceeding at the time of the *Wiese* case, *supra*, and when United of Pennsylvania acquired operating authority, did not erase the Commission's jurisdiction or nullify the mandate of Section 5 in this case. The unlawful control relationships were never approved by the Commission in a Section 5 proceeding and the Commission may not waive this law violation. Indeed, the District Court overlooked the Commission's report in the *Marshall* case (*Refiners Transport & Terminal Corporation—Purchase—Marshall Transport Co.*, 39 M. C. C. 271, 276 (1943)), where the Commission said:

> "If we have approved applications in the past where the factual situation as to the point here involved correspond to that which is presented herein, that would afford no basis for us to administer the statute contrary to its provisions. 'Our authority extends only to the administration of the statute enacted by Congress, and does not extend to the determination of a 'policy' not expressed in the statute itself. United States v. Illinois Central R. Co., 263 U. S. 515; Southern Pac. Co. v. Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541."

The suggestion by the Court below that the Commission may grant new rights "when the violation of Section 5(4) has been due to excusable oversight or neglect" (Appendix "A", p. 38) is plainly wrong. The Commission has held that an illegal control relationship already in existence may be approved where the parties desire to purge themselves of a violation by filing a control application and the evidence shows that the transaction would be consistent with the public interest in other respects and there is strong evidence of an absence of intent to flaunt the law.

Atlas Van Lines, Inc.—Control and Merger—Atlas Van Service, Inc., 70 M. C. C. 629 (1957); *Takin Bros. Frt. Line, Inc.—Control—Iowa-Nebraska Transp.*, 75 M. C. C. 236 (1959). In other words, the existing illegal control relationship between United and its subsidiaries could be approved under Section 5(2) notwithstanding a violation of Section 5(4), but this is far different fro msaying that despite the admitted existence of illegal control, the Commission may grant new or additional authority to a violator who does not submit a Section 5(2) application. This Court has said as plainly as it can be said that the Commission has no authority to act on an application or approve it if there is a Section 5(4) violation. That there is a present violation of Section 5(4) is made clear by the Commission's order dismissing the complaint (Appendix "C", p. 51). Under these circumstances, the Commission had no jurisdiction to grant the application.

When, subsequent to 1935, the *Wiese* acquisition was effected; when Pennsylvania was granted new authority; when Cincinnati obtained common carrier authority, the control of the Parent and the intra-corporate control relationships should have been submitted for approval under Section 5. When the instant application was filed and processed, United, the Parent and all the subsidiaries were in violation of the Act. Hence, this application should not have been granted not only because *Marshall* dictates that result but because the Act so provides.

Section 207 (49 U. S. C. Section 307) provides that no certificate can issue unless the applicant is " * * * able * * * to conform to the provisions of this chapter and the requirements and rules and regulations of the Commission thereunder * * * ". The language of the statute is explicit and allows for no exception. In short, the Commission had no jurisdiction to issue a Certificate to United

until the control relationships were submitted for approval and United, the Parent and other subsidiaries conformed with the law.

Certainly, with the decision in *Marshall, supra,* the law was clarified and immediately thereafter it was incumbent upon either the United family, on its own initiative, or upon the Commission, on its own initiative, to require the United system to come into compliance with the Act.

If a layman is deemed to know the law, surely a large carrier, ably represented by trained counsel, must be presumed to know that *Marshall, supra,* construed the law as it was originally written by Congress.

The Commission may be loathe to retroactively apply the *Marshall* doctrine to the transaction consummated prior to that case (Appendix "C"), but this did not sanction new privileges and licenses when it became clear, as it is now, that the control relationship is illegal and does require approval. At best, since the past completed transactions antedated *Marshall,* United, the Parent and its subsidiaries could and should have come forward and sought approval of the illegally consummated control arrangement and the Commission would not have been barred from granting it.

The District Court's reliance (Appendix "A", p. 37) upon the decision in *American Trucking Associations* v. *United States,* 355 U. S. 121, 2 L. ed. 158 (1957), to prove that Section 5(2)(b) is not applicable to proceedings under Section 207 of the Act, is misapplied and misplaced, since that case only involved the standards which must be applied when a railroad applies for unrestricted motor carrier authority.

Obviously, the District Court misunderstood the special character of the policy and statutory problems which arise when a railroad seeks to invade the trucking field.

All that this Court said is that if a railroad meets the statutory tests under Section 207, there is no need to restrict trucking service to that which is auxiliary to, and supplemental of, rail service. But this Court did say, too, that:

> "'the underlying policy of § 5(2)(b) must not be divorced from proceedings for new certificates under § 207'' (pp. 151-152).

Appellants do not suggest that Section 207 and Section 5 promulgate the identical tests. Appellants do say that Section 207, by its terms, precludes a grant of authority to a carrier who is in violation of Section 5(4) of the Act.

2. The Court below concluded that there was no violation of Section 5, i.e., the Parent and its subsidiary motor carriers was not required to join in an application, when United, as a contract carrier, obtained common carrier authority and when, in 1957, Cincinnati, as a contract carrier, obtained common carrier authority. The Court reasons that since Section 203(a)(16) defines a "motor carrier" as including both a common and contract carrier and Section 5(2) relates only to the acquisition of a "carrier"; there was no violation of Section 5 since no new carrier was acquired in this case. However, Section 5 is not limited to the situation where a new carrier, as a separate entity, is acquired. Thus, the Court below would apply Section 5 only if a different non-carrier subsidiary of the Parent had applied for and obtained the Certificate. But Section 5 is not to be so narrowly construed. Under Section 5 of the Act, a control application must be filed where the control is accomplished "by any means whatsoever." (49 U. S. C. Section 5(4)). This includes the case where a non-carrier Parent, in control of contract carrier subsidiaries, acquires control of a common carrier

operation by reason of the grant of common carrier authority to one or more of its contract carrier subsidiaries. Section 5 does distinguish between common and contract carriers and does not indiscriminately commingle the two. Thus, under Section 5(1) of the Act, only common carriers may engage in pooling. Indeed, the Commission in *Schwerman Trucking Co., supra,* (p. 392) recognized a difference between existing rights and "an entirely *new* situation, namely, a grant of *new* operating authority permitting the performance of a competitive carrier service * * * ".

Here, too, the entire structure of the United family was altered when Cincinnati and United obtained common carrier authority. Thus, while it might be consistent with the public interest for the parent to control subsidiary contract carriers, an entire new question arose when common carriers were added to the family. The potential monopoly thus created and the new competitive position of the United family should have been approved by the Commission. The importance of this question could not be avoided upon the sole ground that a new corporate entity was not created. The cases cited by the District Court (Appendix "A", pp. 39-40) and relied upon by the Commission are not dispositive because the "control" issue was either entirely absent or not raised.

3. The grant of a Certificate to United and the affirmance by the Court below is contrary to a long line of cases construing the statutory standard of "present or future public convenience and necessity" (49 U. S. C. Section 307). Instead of requiring proof of a public need for service and evidence that existing motor carriers are unable to provide the proposed service and that they will not be adversely affected, a Certificate was issued to United based upon the alleged desire of shippers for lower rates

and upon the conjecture that United could operate profitably at its proposed low level of rates. This Court has pointed out that lower rates are a factor in the consideration of public convenience and necessity only where different modes of transportation are involved. (*Schaeffer* v. *United States*, 355 U. S. 83, 91, 2 L. ed. 2d 111 (1958). Clearly, the application should not have been approved upon the promise of low rates, particularly where the same mode of transportation was involved. *Superior Trucking Company, Inc.—Extension—Wisconsin*, 77 M. C. C. 51 (1958); *Atlanta-New Orleans Motor Freight Co.* v. *United States*, 155 F. Supp. 68, 71 (D. C. N. D. Ga., 1953). If a shipper is aggrieved by existing rates, Section 216 provides statutory redress. Absent the promise of lower rates by United, the shipper witnesses would not have supported the application and there was no evidence that shippers required additional motor carrier service.

Assuming, *arguendo*, that rates were a factor for consideration, there was not an iota of evidence that United could operate at the level of rates proposed. The Court below states that the evidence here was "meagre" (Appendix "A", p. 33). It was not "meagre"; it was nonexistent. Surely, neither "meagre" evidence nor the District Court's conclusion that United would not have filed the application unless the operations would be profitable does not meet the criteria of substantiality. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126 (1938); *Universal Camera Corp.* v. *N. L. R. B.*, *supra*.

Railway Express Agency v. *United States*, 153 F. Supp. 738, aff'd per curiam, 355 U. S. 270, 2 L. ed. 2d 234 (1957) is not dispositive here. Here, unlike that case, appellants, among other motor carriers, were providing the necessary service responsive to public demand. While the Court below acknowledged a difference in facts (Appendix "A",

p. 30), it improperly discounted the services of existing motor carriers because the proposed service was allegedly better than parcel post and because the District Court incorrectly found that no one protestant carrier could provide all the service proposed by United (Appendix "A", p. 31). But this conclusion was contrary to the evidence and the law. To begin with, the question as to parcel post service was not an issue in the proceeding. The appropriate standard of comparison was the service performed by appellants and other motor carriers. The evidence overwhelmingly established that appellants and other motor carriers did provide the same service which United proposed and this was also superior to parcel post.

As the Court said in the *Schaeffer* case, *supra*, a reviewing Court ought not "summarily * * * approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress" (p. 121). Appellants respectfully submit that the decision in this case departs radically and unjustifiably, without explanation, from the standards which must be employed in determining "present or future public convenience and necessity." *Florida* v. *United States*, 282 U. S. 194, 74 L. ed. 291 (1939); *Secretary of Agriculture of the United States* v. *United States*, 347 U. S. 645, 98 L. ed. 1015 (1954).

4. The order of the Commission dated February 4, 1960 which approved United's application, was not received by the appellants until February 26, 1960 and was not released or "served" before February 24th or February 25th, 1960. The Certificate was issued on March 9, 1960, so that the order of February 4, 1960 was made effective within less than thirty (30) days of service in violation of Section 221(b) of the Act.

Section 221(b) of the Act specifically provides that all orders of the Commission "shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe * * *". Clearly, the order dated February 4, 1960 was made effective in less than thirty days and, hence, the Commission's act in issuing the Certificate was a nullity.

The Court held, however, that "we think it would be undue literalism to construe Section 221(b) as directing that an order which merely declares the Commission's unwillingness to review the action of one of its divisions, otherwise legally effective, and thereby terminates the stay of Section 17(8), cannot become effective for thirty days." (Appendix "A", p. 42). This is a plain misreading of the Commission's order. That order is not merely procedural in the sense that it denies a motion. The order affirmatively adopted the findings of fact and conclusions of law of Division 1 as if the Commission had set forth the findings and conclusions in a separate report and this order thereby became a "new" order, i.e., an order of the full Commission. Section 221(b) is meaningful when applied to orders of the Commission. The thirty day period is designed to afford a party a reasonable period to file a further petition for reconsideration or to file a petition for a temporary injunction restraining the issuance of a Certificate pending judicial review. Indeed, as the Court below recognized: "To be sure, permitting the order of a division to become effective immediately on the denial of reconsideration by the full Commission may create problems with respect to judicial review, as was vividly illustrated in *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 136 (S. D. N. Y. 1955)". (Appendix "A", pp. 42-43).

The statute is clear and explicit and appellants did not have the burden of showing prejudice (which they did, in

any case) in order to object to a clear violation of the statute.

5. United has been granted the right to engage in dual operations contrary to the provisions of Section 210 of the Act which provides that no one person shall operate as a common and contract carrier unless it is consistent with the public interest and National Transportation Policy. The purpose behind the Act was to prevent possible discriminatory practices which arise by reason of a grant of authority to serve the public either as a contract or common carrier. This possibility of discrimination is particularly significant when the same commodities may be transported in the same territory under either authority. These are precisely the facts in this case. In granting dual operating authority, the Commission made no finding that this would be consistent with the public interest and the National Transportation Policy nor was there any evidence adduced to support such a finding. There was no explanation why the Commission departed from prior norms and criteria where, as in *Railway Express Agency* v. *United States, supra*, Cincinnati was required to consent to a partial revocation of its contract carrier authority before it could obtain common carrier authority.

Additionally, the restrictions imposed here are meaningless because they are clearly incapable of enforcement or being policed. United will use the same equipment, terminals, facilities and employees for common and contract carriage; it will not and cannot maintain separate cost accounting procedures; it can, through the medium of its present retail cost-plus contracts, recover losses from its wholesale operations; it can apply flexible rates; it can subsidize one type of service at the expense of another and to the detriment of competing carriers who

are not favored with the two types of duplicating authority.

The decisions in *Complete Auto Transit Inc.—Extension—Willow Run*, 71 M. C. C. 383 (1957) and *Pacific Motor Trucking Co.—Extension—Oregon*, 71 M. C. C. 561 (1957), relied on by the Court and the Commission, do not support the granting of dual authority here.

Conclusion

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve an application if an illegal control relationship exists, that public convenience and necessity is not established by low rates and that the Commission may not grant a Certificate unless the order is bottomed upon basic findings supported by substantial evidence. Additionally dual operations were improperly authorized.

Appellants believe that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Interstate Commerce Commission and those who are regulated by, and are subject to the jurisdiction of that agency.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Yale Transport Corp., Empire Carriers Corp., Stone's Express, Inc., and Railway Express Agency, Incorporated

December 14, 1960.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Cv. 1045

YALE TRANSPORTATION CORP., EMPIRE CARRIERS CORP., STONE'S EXPRESS INC., and RAILWAY EXPRESS AGENCY, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and UNITED PARCEL SERVICE, INC.,

Defendants.

OPINION

APPEARANCES:

For Plaintiffs Yale Transportation Corp., Empire Carriers Corp. and Stone's Express Inc.:

ZELBY & BURSTEIN, Esqs., by: Herbert Burstein, Esq., of counsel.

For Intervenor Plaintiff, Railway Express Agency Inc.:

WILLIAM H. MARX, Esq.

For Intervenor Plaintiffs Bilkays Express Co., Jersey Coast Freight Line, Inc., Mahon's Express and Parcel Delivery Service, Inc.,

WILLIAM T. GRIFFIN, Esq., of counsel.

For Defendant United States of America and Interstate Commerce Commission:

ROBERT A. BICKS, Esq., Acting Assistant Attorney General and

S. HAZARD GILLESPIE, U. S. Attorney, Attorneys for the United States, by: Donald L. Hardison, Esq., Attorney, Department of Justice, and H. Neil Garson, Esq., Assistant General Counsel, Interstate Commerce Commission, of counsel.

For Intervenor Defendant United Parcel Service, Inc.:

PROSKAUER, ROSE, GOETZ & MENDELSOHN, New York, N. Y.

SCHNADER, HARRISON, SEGAL & LEWIS, Philadelphia, Pa., by: Bernard G. Segal, Esq., Irving R. Segal, Esq., Robert L. Kendall, Jr., Esq., and Jacob Imberman, Esq., of counsel.

Before:

FRIENDLY, Circuit Judge;
MURPHY, and PALMIERI, District Judges.

FRIENDLY, Circuit Judge:

Yale Transport Corporation and two other holders of certificates of public convenience and necessity for common carrier service by motor vehicle here seek to enjoin the enforcement of an order of the Interstate Commerce Commission granting an application of United Parcel Service of New York, Inc., hereafter UPS, under §207 of the Motor Carrier Act, 49 U. S. C. §307, for a certificate to operate as a common carrier. The jurisdiction of the Court is invoked under 28 U. S. C. §§1336 and 1398; a

court of three judges has been constituted as provided in 28 U. S. C. §§2325 and 2284. Railway Express Agency, Inc. and four other holders of common carrier motor vehicle certificates have intervened in support of plaintiffs; they and the three plaintiffs will be referred to as protestants. UPS has intervened as an additional defendant.

UPS is one of a number of operating companies controlled by United Parcel Service of America, Inc., a Delaware corporation, hereafter UPSA. UPS has long held permits authorizing it to engage as a contract carrier with retail specialty shops or department stores in transporting various commodities between such shops and their warehouses and customers (a) between New York City and adjacent areas in New York, Connecticut and New Jersey, and (b) between West Hartford, Connecticut, and three points in New York and one in New Jersey. In addition UPS has been operating since 1953 as a common carrier rendering what is termed wholesale service in intrastate commerce within New Jersey and in the New York City commercial zone as defined by the New York Public Service Commission and in interstate commerce within that portion of the New York City commercial zone as defined by the Interstate Commerce Commission which was covered by the partial exemption from regulation conferred by §203 (b) (8), 49 U. S. C. §303 (b)(8). An affiliate, United Parcel Service, Inc., a Massachusetts corporation, has been engaged since 1956 in contract carrier service for stores in the Worcester, Mass. area and in wholesale common carrier intrastate service within Massachusetts.

UPS' application here was for authority to engage in the common carriage of general commodities (1) between points within the metropolitan area of New York City and certain adjoining portions of New Jersey, New York

and Connecticut; (2) from points in the above area, described as the New York origin area, to points in 13 counties in northern New Jersey, points in Connecticut, Massachusetts, Rhode Island, and a specified territory in eastern New York and returned shipments of the same commodities previously delivered; and (3) from points within and adjoining the metropolitan area of Boston, Mass., described as the Boston origin area, to points in Connecticut, Rhode Island, Massachusetts, northern New Jersey, a described territory in eastern New York, and southern portions of Vermont, New Hampshire and Maine, and returned shipments of the same commodities previously delivered. The authority was sought subject to certain restrictions which, so far as here material, are as follows:

(a) No service was to be rendered in the transportation of any package or article weighing more than 50 pounds or exceeding 108 inches in length and girth combined, with each package or article considered a separate shipment;

(b) No service was to be rendered between department stores, specialty shops and retail stores and their branches or warehouses or between any of them and the premises of customers; and

(c) No service was to be provided in the transportation of packages weighing more than 100 pounds from one consignor at one location to one consignee at one location on any one day.

The application was heard by an examiner. UPS introduced extensive evidence as to the nature of the operation proposed. The service was designed to handle large volumes of small packages in a faster, more efficient and more economical manner than United States parcel post service, at roughly comparable rates; its gen-

eral character was similar to that out of the Chicago area as to which this Court sustained the grant of a certificate in *Railway Express Agency* v. *United States*, 153 F. Supp. 738 (S. D., N. Y.), *aff'd per curiam*, 355 U. S. 270 (1957). Special features included daily automatic pickups, in consideration of a weekly service charge proposed to be $4.00 in the New York origin area and $2.00 in the Boston origin area; next-day delivery service throughout most of the destination territory; deliveries at consignee's premises wherever located and without regard to distance from main highways; a second and, if necessary, a third attempt at delivery if this could not be earlier completed; every reasonable effort to secure the correct address, and notification of this to the consignor, when a package had been misaddressed; return without additional charge of packages which were refused by the consignee or for any other reason could not be delivered; specially designed records to permit prompt answering of inquiries; automatic protection against loss or damage up to $100 per package; receipt of checks as well as cash for C. O. D. shipments; deliveries by uniformed drivers and with vehicles maintained at a high standard of appearance; facilities to permit the handling of fragile merchandise with a minimum of packaging; and collection and return of any package previously delivered, at a charge equal to that for original delivery. All charges were to be billed to and paid by the shippers and hence all shipments would move prepaid.

A large number of shippers from both areas testified as to the advantages of the service proposed by UPS and as to their desire to use it. Protestants and other motor carriers offered evidence as to the availability of service within the area and asserted that UPS' proposed service, although perhaps designed to compete primarily with parcel post, would divert considerable amounts of small

package traffic now moved by them and thereby jeopardize the financial soundness of their service.

The Examiner recommended that the application be granted as regards the Boston origin area but be denied as regards the New York origin area. He rested the latter recommendation primarily on the ground that superimposing common carrier authority upon UPS' existing contract authority in the New York area would result in "dual operations" inconsistent with §210 of the Motor Carrier Act, 49 U. S. C. §310. He distinguished the grant of authority in the Chicago area sustained in *Railway Express Agency* v. *United States, supra*, on the basis that the applicant there had consented to a condition cancelling the portion of its contract permit that authorized service between points to be included in the common carrier certificate.

Exceptions having been taken by both applicant and the intervening motor carriers, Division 1 of the Commission sustained the Examiner's affirmative recommendation as to the Boston area and reversed his negative recommendation as to the New York area, 79 M. C. C. 629 (1959). It found that UPS would furnish a distinctive and useful service not now being furnished either by parcel post or by any of the intervening motor carriers, reviewed the evidence with respect to diversion, and concluded, p. 654, that the proposed service was "responsive to a public need which cannot be met adequately by existing transportation facilities and that it can be performed without adversely affecting the operations of existing carriers contrary to the public interest." The Division also found that the dual operations would not be inconsistent with the public interest provided this was safeguarded by two additional conditions. One of these prohibited deliveries to as well as from the prem-

ises of persons who had entered into contracts with the applicant and were served by it pursuant to permits issued by the Commission. The other reserved to the Commission the right to impose in the future such terms, conditions or limitations on the certificate as it might find necessary to insure that applicant's operations conformed to the provisions of §210. One Commissioner dissented with respect to the New York area on the ground that applicant had failed to meet its burden of proving that "existing carriers specializing in handling small packages are not willing and able to meet the needs shown for service to and from the New York City area", p. 657.

The protestants thereupon applied for reconsideration by the Commission, 49 U. S. C. §17 (b). In consequence the effectiveness of the order of Division 1 was stayed, 49 U. S. C. §17 (8). By order dated February 4, 1960, the petitions for reconsideration were denied. This action followed. Judge Palmieri denied a temporary restraining order and the case is before us on a stipulation that we shall consider the hearing as for both temporary and final relief.

Protestants attack the Commission's order on four principal grounds. First, they assert that the Commission did not have adequate evidence to support its findings of public convenience and necessity of the proposed service and of fitness and ability of the applicant to render it. Second, they contend that the Commission ought not have granted the application in view of the prohibition against dual operations in §210. Third, they urge that the grant of the application is contrary to commands of §5 of the Interstate Commerce Act, 49 U. S. C. §5, relating to acquisitions of control. Finally, they argue that the Commission violated the require-

ments of §221 (b) of the Act, 49 U. S. C. §321 (b), in permitting the certificate to become effective when issued on March 9, 1960, although the order of February 4, 1960 denying reconsideration was not served until February 24 or 25. After careful review we find none of these contentions sufficient to warrant enjoining the Commission's order.

I—Convenience and Necessity and Fitness and Ability

Defendants contend that the issue of convenience and necessity is largely foreclosed by *Railway Express Agency* v. *United States, supra;* protestants assert the circumstances here are significantly different. Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case. Nevertheless, any differences in the evidence as to the value of UPS' service, the availability of other service, and diversion, are not sufficient to take the case out of the area committed to the Commission's judgment. We turn, therefore, to issues of other sorts.

Protestants claim that UPS was merely proposing to render at a lower rate the same service that protestants were rendering or, at least, were able and ready to render. They cite statements of the Commission that an offer of a motor carrier applicant to perform similar services at rates lower than those existing does not warrant the issuance of a certificate, see, e.g., *Interstate Dress Carriers, Inc.*, 77 M. C. C. 787, 791 (1958), these statements being sometimes supplemented with the further remark that "If the rates of protestants are considered by the shippers to be unreasonable, relief is available under other provisions of the Interstate Commerce Act", *Superior Trucking Co.*, 77 M. C. C. 51, 58 (1958).

See also *E. L. Reddish Contract Carrier Application*, 13 Fed. Carrier Cases P 34657 (ICC 1959).[1] They distinguish *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83 (1957), which reversed a denial of a certificate grounded by the Commission on this view, 63 M. C. C. 247 (1955), as dealing with the offer of lower rates by one form of transportation as against another form, the lower rates offered by the motor carrier in that case representing "inherent advantages" of motor as against rail transportation which the National Transportation Policy, 49 U. S. C. preceding §1, required the Commission to regard. It is unnecessary for us to determine whether a finding of public convenience and necessity premised solely upon the ability of an applicant, due to alleged superior resourcefulness and efficiency, to offer rates lower than other carriers of the same *genus*, would be adequately supported. For our review convinces us that protestants' assertion misconceives the evidence and the conclusions that the Commission drew from it.

The evidence of the shipper witnesses, painstakingly reviewed in the report of Division 1, shows that UPS was offering not simply a cheaper but a better mousetrap. It was better than parcel post because of the pickup, assured delivery times, repeated attempts to effect delivery and other features mentioned above. It was better than any service offered by existing motor carriers because although some of these carriers may have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete. The real thrust of protestants' rate argument

[1] In *Schirmer Transportation Co.*, 77 M. C. C. 240, 242 (1958), however, the Commission intimated it might consider an applicant's proffer of lower rates a ground for issuing a certificate if the rates of existing carriers constituted an "embargo" on the movement of the commodity in question.

thus does not lie in the extreme form just stated but rather in their contention that the shippers indicated they would not utilize applicant's service if its rates were higher than parcel post and applicant produced no adequate evidence of its ability to operate at the rates proposed. There would be force in such an argument if it were factually sustained. However, our review of the evidence indicates that neither branch of the argument is supported, at least in the measure that it would have to be to warrant setting aside the Commission's order.

Protestants did elicit, in their cross-examination of a considerable number of shipper witnesses, testimony, in varying degrees of emphasis, that the cost of any service was a consideration and that, however attractive applicant's proposed service was, the attraction would disappear if there were a substantial rate differential as against parcel post. However, it was hardly to be expected that prospective users of applicant's service would publicly announce their firm intention to use it whatever rate applicant might choose to charge. A number of the shipper witnesses were not cross-examined on the point at all, and a few indicated they would use applicant's service even if the rates were considerably higher than parcel post.[2] Neither is it true that UPS submitted no evidence as to its ability to maintain the proposed rates. Applicant presented an exhibit showing that on its relatively small intrastate wholesale operation in New York, the rates of which were similar to those proposed, it had earned, in 1956, a profit of $76,066 on operating revenues of $2,016,680, with an operating ratio of 96.17% in this service as against its overall operating ratio of 97.57% on its total business of nearly

[2] One witness testified "It is worth that to us, even if it was doubled." Others said that service was the prime consideration and rates were only secondary.

$26,000,000.[3] High as such ratios may seem to those used to dealing with other public utilities, the rapid capital turnover characteristic of motor carriage resulted in applicant's overall operating ratio of 97.57% in 1956 yielding a return of some 19% before income tax on its equity and advances from an affiliate. Applicant's witness also testified that "both the retail contract operation and the wholesale common carrier operation have been profitable" for each of the UPSA affiliates save only "a small pilot operation of this wholesale common carrier type" in Minnesota, a wholesale common carrier operation in Michigan, and the new operation in Massachusetts. It is perhaps surprising that applicant did not produce more substantial evidence upon this point, although some of the wholesale operations may have been too recent, when the witness was testifying over three years ago, to have yielded much useful data. Meagre as this evidence was, we cannot say that when it was combined with the more general testimony "that applicant and its affiliates are thoroughly experienced in the transportation of small packages and have developed efficient and economical methods for the handling of such traffic", 79 M. C. C. at 656, and a common-sense inference that so experienced an operator would not deliberately embark reputation and capital on a venture it did not reasonably think it could perform, there was not adequate basis for the Commission's finding that applicant "has made a favorable showing in this respect", both as this bears on convenience and necessity and on fitness and ability.

[3] For the same year the industry-wide figures were 96.3% for interstate carriers and 96.7% for local carriers. Ann Rep. I. C. C. 1957, p. 161.

II—Dual Operations

Section 210 of the Act, 49 U. S. C. §310, prohibits any person from holding both a permit as a contract carrier and a certificate as a common carrier for the transportation of property by motor vehicle over the same route or within the same territory "unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in the Interstate Commerce Act * * *"

In *Gallot—Purchase—Holst*, 45 M. C. C. 1, 4 (1946) the Commission stated that this "prohibition is in recognition of the opportunity for discriminatory practices which is present when a carrier is authorized to offer both kinds of service to shippers." It went on to particularize certain types of such discrimination—ability of the shipper to obtain special treatment on his contract carrier traffic by assuring the dual carrier of certain traffic for transportation in common carrier service; ability of the dual carrier to obtain an undue advantage over competing common carriers by giving the shipper special treatment in contract operations; and ability of the dual carrier to accomplish what amounts to a rebate of part of its common carrier charges by agreeing to contract charges lower than it would otherwise accept.

The Commission has been diligent in enforcing this prohibition. See the cases cited in Hale & Hale, *Competition or Control, III: Motor Carriers*, 108 U. Pa. L. Rev. 775, 826, fn. 226 (1960). However, as the clear terms of the statute show, the prohibition is not absolute.[4] The

[4] Senator Wheeler, who was in charge of the bill, stated, 79 Cong. Rec. 5654 (1935) "There are instances in which both types of opera-

Commission here found that opportunities for discrimination were sufficiently foreclosed by insulating UPS' contract from its common carriage, not only by prohibiting common carriage from shippers utilizing contract carriage as consignors, as UPS had proposed, but also by prohibiting common carriage to such persons as consignees. UPS cites, in support of the Commission's action, *Complete Auto Transit, Inc.—Extension—Willow Run*, 71 M. C. C. 383, 387 (1957) and *Pacific Motor Trucking Co.—Extension—Oregon*, 71 M. C. C. 561 (1957). Protestants seek to distinguish these cases; the distinction asserted in regard to the *Complete* case is more persuasive than as to *Pacific*. Quite apart from Commission precedents, we are unable to see why the safeguards here imposed do not adequately protect against discrimination and consequently how we could say there was no sufficient basis for the Commission's finding that the proposed dual operations would be consistent "with the public interest and the national transportation policy declared in the Interstate Commerce Act."[5]

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tion can advantageously be conducted by the same operator and without prejudice to the public interest, but the possibility of uses developing makes it advisable to give the Commission the power to pass on all cases in which it is proposed to combine the two types of operation."

[5] Protestants refer to the possibilities of unfair rate differentials resulting from the difficulty applicant would have in keeping records that would accurately reflect the costs of the two types of operation. However, this problem is inherent in any form of transportation where many different types of traffic are handled in the same vehicle or train of vehicles. Applicant maintains a formula for allocating costs to its various services, and the Commission's reservation of jurisdiction is adequate to enable the Commission to order special cost studies whenever these may be indicated.

III—Alleged Violations of Section 5

Protestants assert that the grant of a common carrier certificate to UPS would work a change in the character of UPS such as to require a § 5 (2) application by UPSA for approval of control of UPS in the latter's altered state, under the doctrine of *Pan American Airways Co.* v. *CAB*, 121 F. 2d 810, 814-16 (2d Cir. 1941); that there are two other unlawful control relationships in the UPSA family, of which more hereafter; and that the Commission could not lawfully issue a certificate to UPS under these circumstances.

The substance of these allegations was contained in a complaint filed after Division 1 had entered its order granting the UPS certificate and while petitions for reconsideration of that order before the full Commission were pending. At the same time a motion was made to stay all proceedings on the certificate application. On February 4, 1960, Division 1 denied the stay and, on March 2, 1960, Division 4 dismissed the complaint. A petition for reconsideration by the Commission of this order of dismissal is still pending. The Commission argues that, protestants having chosen to proceed in this manner, they are foreclosed from raising the same issues here. We shall not pass on this argument, for we think protestants' contentions fail on the merits.

Protestants' position runs counter to another portion of the *Pan American* opinion, where the Court of Appeals held, at p. 816, that the absence of an order approving the parent steamship company's control of the newly organized airline subsidiary, which the court found to be required, did not bar the issuance of a certificate to the subsidiary. This ruling would seem fully applicable to

the Motor Carrier Act on which, as is well known,[6] the Civil Aeronautics Act was modeled. Protestants assert that this holding in the *Pan American* case has been undermined by subsequent cases, notably *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). This could hardly be so as a matter of decision since *Marshall* was itself an acquisition of control and not a certificate case; and we can find no language in the Supreme Court's opinion that even deals with, much less reflects on, this portion of the *Pan American* decision. Indeed, the only recent pronouncement of the Supreme Court that we deem to have any bearing on the problem seems rather to support the holding in *Pan American*. In *American Trucking Associations* v. *United States*, 355 U. S. 141 (1957), the Court drew a distinction between the considerations governing the issuance of a certificate to a railroad-controlled truck line under §207 of the Motor Carrier Act, 49 U. S. C. §307, and those governing applications for approval of railroad control of a truck line under §5 (2)(b). The Court said, at p. 149, that "the legislative history of the Motor Carrier Act of 1935 gives no indication that §213 (a)(1), the predecessor of §5 (2)(b), was to be considered a limitation on applications under §207" and approved the Commission's practice of accepting "the policy of §5 (2)(b) as a guiding line, not as a rigid limitation" in interpreting §207.

Of course, the Commission would hardly issue a certificate under §207 when there had been a deliberate and serious flouting of the requirements of §5 (4) with respect to the very transportation concerned, and we need not decide whether the rule of the *Pan American* case

[6] See the concurring opinion of member Ryan on remand in *American Export Airlines, Inc.*, 3 C. A. B. 619, 627 (1942), and the supplemental opinion of the full Board on reargument, 4 C. A. B. 104, 107 (1943).

would go so far as to permit this. On the other hand, when the violation of §5 (4) has been due to excusable oversight or neglect, the Commission may well find that the public ought not be denied the advantages of the proposed service during any proceedings necessary for the rectification or removal of the illegal control; certainly the Commission should be able to do this when the alleged illegality concerns an area or a type of transportation unrelated to that for which a certificate is being sought. The seeming simplicity of §5 (2) veils complexities that have baffled not only the industry and the Commission but the Court. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957), 355 U. S. 415 (1958). It would be absurd to hold that innocent failure to anticipate the course of administrative or judicial interpretation of the section necessarily worked a temporary outlawry, at the cost not only of the offender but of the public.

Of the three claims of illegal control made by protestants, the only one relating to the area in which applicant's operations were to be conducted was the claim that the new common carrier authority proposed to be conferred on UPS demanded a proceeding under §5 (2) for approval of additional control of UPS by UPSA.[7] No such approval was needed. Protestants' reliance on *Pan American Airways Co.* v. *CAB*, *supra*, and the decisions of the Commission applying that holding in motor carrier cases, is misplaced. The *Pan American* case dealt with acquisition of a subsidiary which had never been a carrier until it became one by the grant of a certificate; the Court of Appeals held there was no tenable basis for distinguishing between a case where a steamship company acquired all the stock of a company that was

[7] No prior approval of the UPS-UPSA relationship had been had or required since this antedated enactment of the Motor Carrier Act *Greyhound Meigers*, 1 M. C. C. 342, 352 (1936).

already a carrier, in which instance approval would clearly be required, and a case where a steamship company first acquired the stock of a company not engaged in any business and then made it a carrier. This is the principle that the Commission adopted in *M. J. Hannon —Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944), in which the controlling company became a carrier, and followed in *Schwerman Trucking Co.—Control —Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959), overruling *Smith—Control—Cement Transports, Inc.*, 75 M. C. C. 495 (1958). This principle applies only when a controlled or controlling person not theretofore a carrier first becomes one; it cannot logically be extended to require a new proceeding under §5 (2) whenever a carrier controlled by a person who has obtained approval or who was not required to obtain this because of grandfather status, expands its operations. Protestants do not seriously contend that new approval is needed when the expansion is by adding areas or commodities; we see no basis for a different rule when the expansion comes by adding contract or common carrier authority to a carrier that previously held only the other. This conclusion follows as a matter not only of good sense but of language and practice as well. Section 5 (2) relates to acquisition of control of a "carrier", 5(13) defines carrier so far as here relevant as "a motor carrier subject to Part II of this Title", and 203 (16) says that "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." In numerous cases the Commission has approved dual operation by a motor carrier controlled by a person who would be required by 5 (2) to obtain approval of a new acquisition of control of a motor carrier, see *Scott Bros., Inc.—Extension*, 34 M. C. C. 163 (1942); *Complete Auto Transit, Inc.—Exten-*

sion—Willow Run, 71 M. C. C. 383 (1957); *Pacific Motor Truck Co.—Extension—Oregon*, 71 M. C. C. 561 (1957); cf. *Rogers Cartage Co.—Extension*, 27 M. C. C. 276 (1941). In none has the Commission indicated that action under §5 (2) would be required.

The other two allegedly unlawful control situations concern operations unrelated to the areas here involved. Protestants claim that the Commission granted a 1938 application for a contract carrier permit for United Parcel Service of Pennsylvania, Inc., 10 M. C. C. 83 (1938), which thereby became a carrier for the first time, without the parent UPSA having applied for approval of control as was later held to be required when the Commission in the *M. J. Hannon* case, *supra*, adopted the rule of the *Pan American* case. If the Commission is concerned about this omission understandably made a score of years ago, §5 (7) affords a remedy; but this did not forbid the issuance of a certificate here, even if we assume that protestants have standing to raise the question. The other alleged illegality is that in proceedings wherein the Commission allowed United Parcel Service of Portland, Oregon, to purchase the operating rights of A. J. Wiese, 37 M. C. C. 473 (1941), and approved the acquisition of control of the Portland company by United Parcel Service of America, Inc., a Nevada corporation, UPSA, which owned all the stock of the Nevada corporation, did not join as an applicant, as *United States* v. *Marshall Transport Co.*, *supra*, later held it should. However, the Supreme Court has said in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 171 (1957), that although the Commission may require the ultimate parent to be joined as an applicant, such joinder is not jurisdictional and lack of it does not make the Commission's grant of approval unlawful. Even if the case were otherwise, the same considerations stated in connection with the Pennsylvania company would deprive the argument of effect here.

IV—Alleged Violation of §221 (b)

Section 221 (b) of the Motor Carrier Act, 49 U. S. C. §321 (b), says that "Except as otherwise provided in this chapter, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe * * *." Section 16 (5) directs that "Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law." The Commission's order denying reconsideration of the order of Division 1 granting the certificate, although dated February 4, 1960, was not served until February 24 or 25. The certificate was issued on March 9, effective immediately. Protestants urge that the certificate could not validly be made effective less than thirty days from the date of its issuance or, in the alternative, that it could not be issued in less than thirty days from what they claim to be the earliest possible effective date of the February 4 order, to wit, thirty days from the date of service, or March 25.

Protestants' first position requires little discussion. In *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 432 (1947), the Supreme Court held that the authorization in §315 (c) of the Interstate Commerce Act, 49 U. S. C. §915, to the Commission to "suspend, modify, or set aside its orders" with respect to water carriers "upon such notice and in such manner as it shall deem proper" did not authorize the Commission so to modify a certificate, the Court saying "That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used in the Act." On a parity of reasoning, assuming that the direction in

§221 (b) that an order shall not become effective in less than thirty days applies to an order granting a certificate, this means only that the certificate cannot become effective until the order has become effective, not that the certificate is itself an "order" and must contain still another thirty-day waiting period.

Protestants' alternative position is likewise unsound. We shall assume in protestants' favor, without deciding, that §221 (b) applies to orders granting certificates, as literally it surely does, despite the contrary view with respect to the corresponding provision, §15 (2), in Part I of the Interstate Commerce Act intimated in *Breswick & Co.* v. *United States*, 138 F. Supp. 123, 128 (S. D. N. Y. 1956), *reversed on other grounds*, *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). It would follow that the thirty-day requirement of §221 (b) applied to the June 3, 1959 order of Division 1 granting the certificate which, under §17 (4), had "the same force and effect * * * as if made or taken by the Commission." As a result of the applications for reconsideration by the full Commission and the stay granted by §17 (8), any time requirements with respect to effectiveness of that order have been amply fulfilled. Protestants say, however, that the order of February 4, 1960 denying reconsideration was itself subject to §221 (b) and could not become effective until thirty days after service. Assuming in protestants' favor, again without deciding, that the service requirement of §16 (5) is to be read into §221 (b), we think it would be undue literalism to construe §221 (b) as directing that an order which merely declares the Commission's unwillingness to review the action of one of its divisions, otherwise legally effective, and thereby terminates the stay of §17 (8), cannot become effective for thirty days. To be sure, permitting the order of a

division to become effective immediately on the denial of reconsideration by the full Commission may create problems with respect to judicial review, as was vividly illustrated in *Breswick & Co.* v. *United States*, 134 F. Supp. 132, 136 (S. D. N. Y. 1955). However, to construe §221 (b) as compelling a delay of another thirty days in every case would present even worse problems. We believe Congress did not mean to impose any such shackles but rather to leave the matter to the Commission's good judgment.[8]

Even if we were to take a different view, it would not avail protestants. Section 10 (e) of the Administrative Procedure Act, 5 U. S. C. §1009 (e), directs that in judicial review of administrative action "due account shall be taken of the rule of prejudicial error." Protestants were not prejudiced by issuance of the certificate on March 9 rather than a fortnight later. They had two weeks between service of the Commission's order denying reconsideration and the issuance of the certificate, in which to initiate this action. In fact the complaint was filed on March 14, only five days after the certificate was issued. Neither Judge Palmieri in refusing a temporary restraining order nor we in denying an injunction have relied in any way on UPS' beginning to operate under a certificate which UPS knew was subject to challenge.

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[8] Apparently the Commission's practice in this respect is not uniform. In *Seatrain Lines, Inc.* v. *United States*, 152 F. Supp. 619, 621 (D. Del. 1957), *aff'd per curiam* 355 U. S. 181 (1957), a Commission order denying reconsideration made the Division order effective 52 days thereafter. In *Consolidated Freightways, Inc.* v. *United States*, 176 F. Supp. 559, 561 (N. D. Cal. 1959), a Commission order denying reconsideration made the Division order effective 55 days thereafter.

Accordingly the requests for temporary and final injunctions are denied and the complaint dismissed.

Dated: New York, N. Y.

HENRY J. FRIENDLY
HENRY J. FRIENDLY
United States Circuit Judge

I concur

THOMAS F. MURPHY, D. J.
THOMAS F. MURPHY

I concur

EDMUND L. PALMIERI, D. J.
EDMUND L. PALMIERI

Judgment Entered 6/10/60
HERBERT A. CHARLSON
Clerk

Appendix B

INTERSTATE COMMERCE ACT:

Section 5 (49 U. S. C. Section 5):

"(2) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify

the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

* * * * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to ac-

complish or effectuate, or to participate in accomplishing or effectuating, the control, or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

* * * * *

"(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate."

* * * * *

Section 17(8) [49 USC Section 17(8)]:

"Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

* * * * *

Section 207 (49 U.S.C. 307):

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Section 210 (49 U.S.C. Section 310):

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operations for the transportation of property by motor vehicle over the same route or within the same territory, and

(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

* * * * * *

Section 221(b) [49 U.S.C. Section 321(b)]:

"Except as otherwise provided in this part, all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

* * * * * *

Administrative Procedure Act:

Section 8(b) [5 U.S.C. Section 1007(b)]:

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such

exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * * * * *

Section 10(e) (5 U.S.C. Section 1009(e)):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of September, A. D. 1960.

No. MC-F-7321

YALE TRANSPORT CORP. ET AL.
(New York, N. Y.)

v.

UNITED PARCEL SERVICE OF AMERICA, INC., ET AL.
(New York, N. Y.)

It appearing, That, by order of the Commission, division 4, entered March 2, 1960, which order is hereby made a part hereof, the complaint under section 5(7) of the Interstate Commerce Act by Yale Transport Corp., Empire Carriers Corp., and Stone's Express, Inc., naming as defendants United Parcel Service of America, Inc., a Delaware holding company, not a carrier, and two wholly-owned subsidiaries of the Delaware company, United Parcel Service, Inc., formerly known as United Parcel Service of Cincinnati, Inc., and United Parcel Service, Inc., formerly known as United Parcel Service of New York, Inc., motor carriers, listing other subsidiaries and affiliates of the Delaware company, of which United Parcel Service of Pennsylvania, Inc., and United Parcel Service of Portland, Inc., herein called the Pennsylvania and the Portland companies, respectively, are motor carriers, and alleging violations of section 5(4) of the act as specified in the complaint, was dismissed:

It further appearing, That by petition dated March 31, 1960, complainants seek reconsideration of the order of March 2, 1960, and request oral argument; and that defendants have replied;

And it further appearing, (1) That the transaction presented under section 5 of the act in *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473 (1941), involving as party vendee the Portland company, was approved and authorized before the decision in *Refiners Transport & Term. Corp.—Purchase—Marshall*, 39 M. C. C. 271 (1943), sustained in *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), and (2) that the Pennsylvania company was granted a permit as a contract carrier by motor vehicle in *United Parcel Service of Pennsylvania, Inc., Contract Carrier Application*, 10 M. C. C. 83 (1938), as supplemented in 20 M. C. C. 799 (1939) and 22 M. C. C. 243 (1940), prior to the decision in *M. J. Hannon—Control—Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); and that institution of an investigation under section 5(7) of the act, or to find merit in the complaint, based on retrospective application of the principles stated in the *Refiners* and *Hannon* cases, would be unreasonable, *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, cf. *Yale Transportation Corp. et al.* v. *United States et al.*, (60 Cv. 1945) F. Supp., filed June 10, 1960; that no facts or substantial argument has been advanced by petitioners that warrants reconsideration; and that oral argument is unnecessary.

It is ordered, That the petition be, and it is hereby denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)